Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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NO. 88-983

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1988

JOE LACEY,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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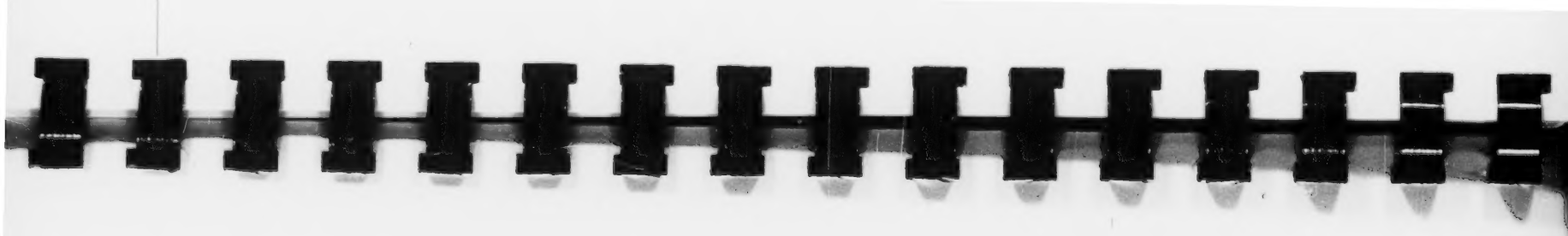
ATTORNEY FOR PETITIONER

DECEMBER 8, 1988

QUESTION PRESENTED FOR REVIEW

WHETHER THE APPEALS COURT ERRED IN UPHOLDING THE EVIDENTIARY USE OF TAPE CONVERSATIONS OBTAINED AFTER THE ARREST OF A DEFENDANT TO PROVE A CONSPIRACY WHEN THE OBJECT OF THE CONSPIRACY HAD CEASED?

A CONSPIRACY SHOULD NOT BE PROVEN BY PILING INFERENCE UPON INFERENCE.



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OPINION BELOW

The Appellant, Joe Lacey, was convicted in the United States District Court for the Western District of Tennessee in violation of Title 21, U.S.C. § 846.

The decision of the court of appeals affirming the district court was designated as not for publication and is set forth at App. A 1 to A 27.

STATEMENT OF JURISDICTION

The federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter.

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254. Judgment of the Sixth Circuit Court of Appeals was filed and entered Sept. 16, 1988.

21 U.S.C. § 841(a)(1) - Prohibited Acts A

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 U.S.C. § 846 - Attempt and Conspiracy

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of

which was the object of the attempt or conspiracy.

28 U.S.C. § 801(d)(2)(e) - Hearsay

The statement is offered against a party and is a statement by a cocospirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF CASE

A. Proceedings Below

Petitioner, Joe Lacey was indicted along with eleven other co-defendants. Mr. Lacey was charged with only one count of the indictment (Count 1) in a conspiracy that began on or about April 30, 1985. The indictment alleges his involvement occurred on or about June 3, 1986.

Following a trial by jury, Joe Lacey was convicted of the offense of willfully and knowingly violating Title 21 United States Code, Section 846 in that it was alleged that he willfully and knowingly did combine, conspire, confederate and agree to commit the offense of conspiring to unlawfully and knowingly possess with intent to distribute cocaine. Mr. Lacey was thereafter assessed a term of eight years confinement and fine of Fifty Dollars ($ 50.00).

B. Statement of Facts

1. The Charge

The indictment charged a multiplicity of events under several counts. Under Count 1, the indictment alleged that Mamie Wilson and Joe Lacey and a number of other people:

> From on or about April 30, 1985 and continuing thereafter up to and including on or about July 10, 1986, ... the Defendant ... willfully and knowingly did combine, conspire, confederate and agree ... to commit the following offenses against the United States:
>
> 1. To unlawfully, knowingly and intentionally possess with intent to distribute cocaine and marijuana, controlled substances, in violation of Title 21, United States Code, Section 841(a)(1).
>
> 2. To unlawfully, knowingly and intentionally distribute cocaine and marijuana, controlled substances, in violation of Title 21 United States Code, Section 841(a)(1).
>
> This conspiracy consisted of an agreement between and among the various co-conspirators allowing for each member thereof to perform certain specific functions designed when each conspirator performed his part to develop a market for and supply users and peddlers with illicit and illegally obtained cocaine and marijuana. It was a further object of the conspiracy to collect the proceeds from the distribution of cocaine and marijuana and cause these proceeds to be transmitted from wholesale and retail sellers of cocaine and marijuana to the ultimate suppliers.

(Tr. p. 1 of Indictment).

As part of the overt acts, paragraph ten

alleges that on or about June 3, 1986, Cynthia Arnold made arrangements to deliver approximately eight ounces of cocaine to Joe Lacey in Memphis, Tennessee. (Tr. p. 3 of Indictment). Paragraph twenty-six refers to Freeman Monger as having conversations with Joe Boone on July 3, 1986 discussing distribution of marijuana. (Tr. p. 5 of Indictment).

II. Synopsis of Evidence

The Government's case edges on the following facts: that on June 3, 1986, Lacey contacted Arnold to purchase a quantity of cocaine. (R. Vol. I, 121). After this conversation, Arnold contacted Freeman Monger at Memphis International Realtors to assure that the cocaine would be available and to ascertain a price. (R. Vol. I, 121).

All other witnesses who testified at the trial on behalf of the Government were federal and state agents who had either intercepted phone

conversations or had participated in the surveillance and arrest of Lacey and Arnold. (Agent Lawrence D. Courtney, R. Vol. I, pp. 139-148; Carolyn W. Jackson, R. Vol. I, pp. 148-150; Jericka Ann Robinson, R. Vol. II, pp. 176-177; Pechone Chambers, R. Vol. II, pp. 186-139, 196, 197; Billy Joe Munday, Jr., R, Vol. Ii, pp. 201-203; Lawrence Norman Phelps, R. Vol. II, pp. 223-225, 233, 235; Walter Hoback, R. Vol. II, 241-244; Tommy L. Burton, R. Vol. II, p. 249; Katherine T. Churchill, R. Vol. II, pp. 251, 253; Joseph Bettner, R. Vol. II, pp. 259-261).

The scenario of the case indicates that on June 3, 1986, Lacey contacted Arnold seeking information as to her ability to produce eight ounces of cocaine. (R. Vol. II, 121). Thereafter, Arnold contacted Freeman Monger to ascertain that the cocaine was available. (R. Vol. II, 121, 168-169). Arnold, after acquiring the cocaine, then left to the apartment where

Lacey was staying while in Memphis and, as she left her car and began walking into the complex, agents perfected her arrest. (R. Vol. II, 124, 187, 188-189, 197, 243). These same agents then approached the residence at which Lacey and another, Otha Northington, were inside, and, upon hearing the breaking of glass, apprehended Lacey and Northington. (R. Vol. II, 190, 225).

While inside the apartment, the agents retrieved several items of evidence indicating that Lacey had been staying at the apartment for a period of time and recovered evidence from a vehicle occupied by Lacey indicating his presence in Memphis. (R. Vol. II, 228, 229, 230, 231, 232). A set of scales were also recovered from the apartment in a room in which receipts with Lacey's name appeared. (R. Vol. II, 220).

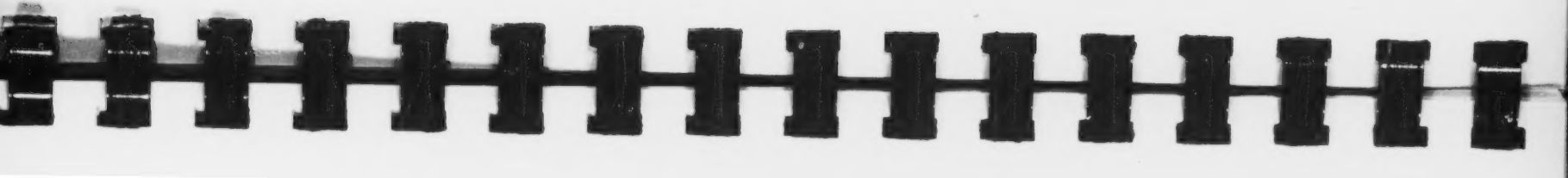
Upon arrest, Lacey falsely identified himself to the agent, but eventually gave his true name and address. (R. Vol. II, 259, 260, 261). Lacey

was thereafter released the same day. (R. Vol. II, 193-194, 196, 253).

On June 5, 1986, two days after the arrest of Lacey, Arnold, Monger and the other co-conspirators, Lacey contacted Arnold and indicated that he knew a lawyer capable of helping them if they would pay the lawyer Twenty Thousand Dollars ($20,000.00). (R. Vol. I, pp. 126).

The crux of the Government's case is summed up in its final argument before the jury:

> In the first instance we have Cynthia Arnold as a witness. Basically, I would submit to you this is probably the only witness that the Defendant is even going to attempt to attack the credibility of, Ms. Arnold. We have got to look at Ms. Arnold's testimony in light of the whole case. First of all, what would be her motive to testify falsely? I would submit to you absolutely none. She has pleaded guilty in this case. She has been sentenced in this case. She can't help or hurt herself in this case, unless she does one thing, and that one thing is lie. That is the only thing that can hurt her. She has a great motivation to tell the truth. She doesn't really have any motivation to help or hurt anyone, but she has a great motivation to tell the truth, the reason being the only way Ms. Arnold now can



affect her life in the future is if she lies under oath.

Basically, what Ms. Arnold told us is that around June 3rd of 1986 she was contacted by Mr. Lacey in regard to her supplying through Freeman Monger Mr. Lacey with eight ounces of cocaine that apparently was going to one of Mr. Lacey's dealers, going through him to someone else. Let's take that just a minute and look at whether the proof right there supports or contradicts that very little bit of proof.

One thing we know, first of all, is that prior to Ms. Arnold being arrested, she doesn't get caught. She has a phone call with Freeman Monger, who is supplying the dope, and what she asked Freeman Monger is what? "What kind of price can you give Joe?" Basically, I would submit to you under the proof there were only two people in that apartment that could have been receiving that dope, and that was Otha Northington, who she later said was the person to be receiving it, or Joe Lacey. Her first conversation before, when she doesn't know they were being recorded, a wire tape conversation, she says, "What kind of price can you give Joe?" Does that support her assertion on the stand yesterday that she was delivering this cocaine to Joe Lacey? Certainly, it does. Certainly, it does. It doesn't say, "What kind of price can you give Jim", or, "Otha." "What kind of price can you give Joe?"

The second thing that supports the ultimate recipient of that dope is to see who contacts Cynthia later and who talks to Cynthia and Freeman Monger abut where the leak is, where the Informer is. Is it Otha Northington? No. It is Joe Lacey, and you heard that conversation. A good deal of that conversation is their discussion of, "Whether it is on your end, Joe, or whether it is on our end." What

are they talking about? Quite obviously, they are talking about the -- they think at that point there is an informant. They don't know about the wire tap. They think somebody that said, "Hey, there is going to be some dope deal," and they are trying to figure out whether or not that person came from Freeman Monger's people saying, "Cynthia Arnold is going to deal dope," or was it one of Joe Lacey's people saying, "Joe Lacey is going to receive dope." You heard a great deal of that conversation, and most of it relates to what end was it on. "Was it on your end, Joe, or was it on ours?" They think it was on Joe's end, and Joe thinks it was on their end. Each person thinks the other person had got an informant in their organization.

That obviously supports the testimony of Cynthia Arnold. Again, they don't know these conversations are being recorded. They don't know they are ever going to be brought to indictment. They certainly don't know they are every going to be played in a court of law, so they have no reason whatsoever to make up or lie about these conversations. The entire conversation is about Joe Lacey.

She then later has a conversation with Freeman Monger, Cynthia does, where she is obviously on call holding where you get a blip and go to another line and talking to Joe Lacey at the time and relaying back to Freeman Monger what Joe Lacey is telling her, and Joe Lacey on this call is obviously telling her, from her recitation of the call to Freeman Monger, that if he gets Twenty Thousand Dollars ($20,000.00), he can get everybody out of it, and all this business, and again, that obviously is corroborative of the fact that the principal in this eight ounce cocaine transaction was, in fact, Joe Lacey.

You, of course, heard from the officers concerning the details of the arrest. You heard from Officer Chambers that when he looked into the back window, who did he see? He saw Joe Lacey in that apartment. The window broke as they were running around in front of the apartment to attempt to get in. They eventually did get in the front of the apartment, but by that time Joe Lacey and another individual, Otha Northington, and I would submit to you it really doesn't matter as far as being a charged party. It is a fairly good inference Otha Northington was one of Mr. Lacey's people. He was going to probably get the dope to assist in distributing it, but Otha Northington and Joe Lacey went out the broken window in the back of the apartment and start running.

(R. Vol. III, 372-375).

As his final rebuttal summation, Government counsel argued that a conspiracy did exist because of the agreement between Lacey and Arnold and then goes on to say:

He then talks to Mr. Monger about -- Mr. Lacey does -- which said the informant may have been on, which side gave us up. Does that indicate there was a prior agreement? Certainly, it does. There would be no reason to be talking about that if there was not a prior agreement to distribute; in fact, probably an agreement farther down the line than the scope of this proof allows or that has been proven in this case, because it is obvious Mr. Lacey through is work has people working

> for him down the line in the distribution chain. He talked about, "Was it me," and, "Was it my people working for me or for you?"

(R. Vol. III, 397).

The court below then orally charged the jury which encompasses some thirty-one pages of the statement of facts. (R. Vol. III, 401-430, 432-433). No written charge was prepared or allowed the jury for its review while in deliberations and none appears in this record although all physical evidence and transcripts of tape recordings were allowed for review. (R. Vol. III, 433, 434, 442, 443). The jury then deliberated and reached its verdict of guilty. (R. Vol. III, 443-444).

III. Cynthia Arnold - Evidence of Conspiracy

The only witness or evidence produced by the Government in this case comes exclusively from Cynthia Arnold. Ms. Arnold clearly testified to at least three things: (1) she had known Lacey for several years, (2) Lacey did contact her on

June 3, 1986, and (3) this was the first time that Lacey had ever attempted to transact any narcotics dealings with her. With regard to Lacey's knowledge of the existence of the Memphis conspiracy, the following testimony was elicited on cross-examination:

Q. So the only contact you had is was basically during this June 3rd time you testified to?

A. Yes, and one time before then I had talked to him, but it wasn't anything to do with drugs.

Q. Did Mr. Lacey know Freeman Monger?

A. No.

Q. Did he know your relationship with Freeman Monger?

A. Yes.

Q. What did he now?

A. That I was Freeman's girlfriend.

Q. But that was it?

A. Yes.

(R. Vol. I, 127)

Ms. Arnold, the Government's chief prosecution witness, goes on to say that Lacey knew nothing about her activities in 1985 and that there was no agreement reached concerning money and she did not know if Lacey had the money to pay for the narcotics for, if he did not have the money, she would have left. (R. Vol. I, 130-131, 132). She makes clear that Lacey knew nothing about her activities with Freeman Monger nor anything about the Memphis International Realty and that she was making this one time delivery to Lacey on June 3rd. (R. Vol. I, 132-133). In fact, it was stated by Ms. Arnold that she had previously given a statement to law enforcement authorities that she was delivering the cocaine to Otha Northington and not to Lacey. (R. Vol. I, 135, 136, 138). She further admits that this one time transaction was not a part of any scheme with any

other person involved with Monger or Monger's Memphis International Realty.

IV. Otha Northington - Lacey's Co-Conspirator

The inference which the Government sought to prove from the evidence was that Otha Northington's presence alone in the apartment with Lacey where Arnold was delivering drugs to Lacey indicates the conspiracy existed and that there was more than just an arrangement for Arnold to obtain some cocaine - such was the thrust of the Government's final summation. (R. Vol. III, p. 374).

Otha Northington did testify at the trial and, although acknowledging his being indicted along with other co-conspirators, testified that the Government dismissed the charges against him. (R. Vol. II, 272-273, 275, 276, 277; Exhs. 9 and 10). Further, Mr. Northington testified unequivocally that he knew nothing of a conspiracy, was present only in the apartment,

and ran when he observed several people outside struggling with guns. (R. Vol. II, 283-284, 285-289).

V. Knowledge of Lacey's Participation

As previously discussed, supra dictus, Cynthia Arnold testified that Lacey knew nothing about her drug transactions with Freeman Monger or their connection with the realty company being used as a "front" for distributing narcotics. Likewise, Otna Northington flatly denies any participation in any conspiracy which was supported by the Government's dismissal of the indictment against him.

Officer Lawrence Phelps admitted that he had no knowledge of Lacey's connection with Arnold prior to June 3, 1986; was not aware of any connection Lacey may have had with the Memphis International Realty; and had no reason to believe that Lacey's presence alone on June 3 in the apartment connected him with the overall conspiracy as

alleged in the indictment. (R. Vol. II, 234, 235, 240).

VI. Tape Recording - Exhibits 1, 2, 3, 4.

Four tape recordings were introduced into evidence over strenuous objections by the defense. It is these recordings which the Government relies heavily upon to establish that Lacey knew of the conspiracy and voluntarily and knowingly entered into it along with Arnold and Monger.

a. Exhibits 1 and 2: The Negotiations

After having elicited that a telephone tap had been placed on several telephones, officer Carolyn W. Jackson testified that she had monitored a phone call to Freeman Monger from Cynthia Arnold which took place on June 3, 1986. (R. Vol. I, pp. 148, 149-150).

Defense counsel strenuously objected to the introduction of this recording on the basis that the Government had failed to establish any

conspiracy and that there had been no opportunity to cross-examine Monger. (R. Vol. I, pp. 152-153, 153-156). The Court overruled the objection and the Government subsequently introduced the recording as Exhibit 1. (R. Vol. I, 156; Vol. II, 166).

From the testimony elicited at the trial, it appears that these telephone conversations simply reflected conversations between Cynthia Arnold and Freeman Monger regarding the price and arrangements for a delivery of cocaine to "Joe." (R. Vol. II, pp. 166, 168-169).

Thereafter, officer Jericka Ann Robinson testified that she intercepted a call on June 3, 1986 to Monger's residence which did not make any reference to Lacey whatsoever. (R. Vol. II, 177, 182, 183, 184).

Again, counsel objected to the introduction of this recording on several grounds. Counsel argued first of all that no evidence had been

introduced to show that there existed a conspiracy or that the defendant (Joe Lacey) was a member of the conspiracy. He further contended that the call between Monger and Arnold had nothing to do with the accused and the failure to produce Monger for cross examination would interfere with the rights of confrontation and cross examination. (R. Vol. II, 180, 181).

After the court below overruled the objections, Exhibit 2 was introduced and played before the jury. (R. Vol. II, 183).

b. Recordings 3 and 4: Contacts After Arrest

Officer Billy Joe Mundy testified that he was involved with the investigation of the Freeman Monger organization and had monitored a wire tap on June 5, 1986. (R. Vol. II, 201, 202, 203).

Prior to any introduction of these recordings, defense objected to any tapes taken after June 3, 1986, on the basis that they were irrelevant as not being in furtherance of any conspiracy since

the conspiracy, if any, had ended upon the arrest of Monger and Arnold. (R. Vol. II, 205). These, calls, contended counsel, were highly inflammatory and prejudicial with regard to statements being made by Arnold. (R. Vol. II, 206, 212, 214). Once again, the court below overruled the objections and allowed the tapes referred to as Nos. 1676 and 1677 to be admitted and played to the jury. (R. Vol. II, 219).

The content of these conversations were that Lacey was concerned as to an informant and had made representations that he could obtain an attorney for Arnold who could help and that the attorney's fee would be Twenty Thousand Dollars ($20,000.00).

ARGUMENT

It is clear that various circuits have taken the position that post-arrest statements are hearsay as to a defendant and inadmissible to prove a conspiracy. U.S. v. Palow, 777 F.2d 52 (1st Cir. 1985), cert. denied 106 S. Ct. 1277, 89 L.Ed.2d 585. See, U.S. v. Muller, 550 F.2d 1375 (5th Cir. 1977), cert. denied 98 S. Ct. 522, 434 U.S. 971, 54 L.Ed.2d 460. Accordingly, the government was allowed to introduce post arrest statements (tape recordings) in order to prove their conspiracy case in chief when there was no direct evidence linking the defendant to the conspiracy. In fact, the government's witness who plead guilty to the conspiratorial charge exonerated the defendant as to any agreement to conspire or knowledge of the overall conspiracy scheme.

It is equally clear that a person should not be convicted of a conspiracy by the piling of

inference upon inference to establish the conspiracy. U.S. v. Pantoja - Soto, 739 F.2d 1520 (11th Cir. 1984), U.S. v. Sheikh, 654 F.2d 1057 and U.S. v. Krulewitch, 336 U.S. 440 (1949). To allow the piling of inferences for a conviction would allow deviation from accepted and usual courage of judicial proceedings that requires a burden of proof beyond a reasonable doubt.

CERTIFICATE OF SERVICE
AND AFFIDAVIT OF MAILING

I am OTHA T. CARPENTER, do hereby certify that a Petition for Writ of Certiorari for JOE LACEY, Petitioner, was placed in the United States Mail on or about November 14, 1988, within the prescribed time limits. The petition was sent from Houston, Texas by U. S. express mail and that to the best of my knowledge the mailing took place to the following:

1. Clerk of the Supreme Court
   1 First Street, N. E.
   Washington, D.C. 20543

2. Mr. Timothy R. DiScenza
   Assistant United States Attorney
   167 N. Main St., Room 1026
   Federal Office Bldg.
   Memphis, Tennessee 38103
   FTS 222-4231

3. Solicitor General
   Department of Justice
   Washington, D.C. 20530

All parties required to be served have been served.

Otha T. Carpenter

OTHA T. CARPENTER

SWORN AND SUBSCRIBED BEFORE ME THE UNDERSTANDING AUTHORITY THIS 8th DAY OF December, 1988.

B L Burnett

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

MY COMMISSION EXPIRES:

B. L. BURNETT
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
SEPT. 28, 1990

NO. _____

IN THE

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JOE LACEY,

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APPENDIX

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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ATTORNEY FOR PETITIONER

APPENDIX

NOT RECOMMENDED FOR PUBLICATION

NO. 87-5993

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOE LACEY,

Defendant-Appellant,

Decided and Filed _____

BEFORE: WELLFORD and NORRIS, Circuit Judges; and COOK, District Judge.*1

ALAN E. NORRIS, Circuit Judge. In this appeal, we consider the sufficiency of the evidence to support defendant's conviction of conspiracy to possess with intent to distribute and to

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1The Honorable Julian A. Cook, United States District Judge for the Eastern District of Michigan, sitting by designation.

distribute cocaine, and the admissibility of certain recorded telephone conversations between alleged coconspirators.

An investigation of drug activities in Memphis, Tennessee led law enforcement officers to Memphis International realtors, a business firm operated by Freeman Monger as a front for the distribution of drugs. Agents of the Drug Enforcement Administration obtained judicial authorization to place a wiretape on the business telephone. The wiretap was later extended to cover the residential telephones of Monger and his girlfriend, Cynthia Arnold.

On June 3, 1986, agents intercepted a call from Joe Lacey, defendant-appellant, to Arnold. Defendant said that someone wanted eight ounces of cocaine and he asked Arnold if she had it. Arnold told defendant that she would call him back. Arnold then placed a call to Monger and asked him, "What kind of price can you give Joe?"

Monger did not give her a specific price, and Arnold stated that she would work something out with defendant. Monger told Arnold to tell defendant that next time, defendant should talk to Monger directly. Arnold called defendant and told him she was on her way over.

Police followed Arnold to an apartment complex in Memphis. As Arnold walked toward the apartment building, they arrested her and seized eight ounces of cocaine. Arnold indicated that she was going to a particular apartment in the complex and police went to that apartment, knocked on the door, and identified themselves. Defendant and Otha Northington, who were inside the apartment, climbed out a back window and were apprehended as they attempted to flee. In a bedroom of the apartment, police discovered a set of triple-beam scales, cleaning receipts bearing defendant's name, and used airline tickets. At the time of his arrest, defendant possessed a set

of car keys which fit a car parked at the complex. Additional cleaning receipts and airline tickets were found in the car.

On June 5, 1986, two days after defendant and Arnold were arrested and released, police intercepted a phone call involving defendant, Arnold and Monger. The parties to the phone conversation believed that someone had informed the police of Arnold's attempted delivery, and argued about which "end" the leak came from. In a second conversation on June 5, Arnold told Monger that defendant insisted the leak did not come from his end, and that, for $20,000, he could get a lawyer to take care of everything.

Defendant and eleven other persons[2] were

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[2]Monger and Arnold were named as codefendants on the conspiracy count, and were also charged with other offenses. Arnold entered into a plea bargain and pleaded guilty to the conspiracy count only. Northington was charged with possession of cocaine and aiding and abetting by separate indictment, which was later dismissed.

indicted on one count of conspiracy to possess with intent to distribute and to distribute cocaine, in violation of 21 U.S.C. § 846. At trial, tape recordings of the June 3 and June 5 telephone conversations were played to the jury. The jury returned a guilty verdict and defendant was sentenced to eight years' imprisonment. As his first assignment of error, defendant challenges the sufficency of the evidence to sustain his conspiracy conviction. In reviewing a sufficiency claim, "this court does not sit as a trier of fact and may not enter into a de novo consideration of the evidence." United States v. Ayotte, 741 F.2d 865, 867 (6th Cir.), cert. denied, 469 U.S. 1076 (1984). Rather, we determine whether, "viewing the evidence in the light most favorable to the prosecution, any ration trier of fact could have found the essential elements of the crime beyond a resonable doubt." Jackson v. Virginia, 443 U.S.

307, 319 (1979).

The essence of a conspiracy under 21 U.S.C. § 846 is an agreement to violate the federal narcotics laws. See United States v. Flowers, 818 F.2d 464, 467 (6th Cir.), cert. denied, 107 S.Ct. 2196 (1987). An agreement between conspirators need not be formal or express, but may be inferred from acts committed with a common purpose. Ayotte, 741 F.2d at 867.

"[T]he government must prove that a conspiracy existed, that the accused knew of the conspiracy, and that he knowingly and voluntarily joined it." United States v. Christian, 786 F.2d 203, 211 (6th Cir. 1986). After the existence of a conspiracy has been established, only slight additional evidence is required to connect a particular defendant with it. United States v. Hamilton, 689 F.2d 1262, 1275 (6th Cir. 1982), cert. denied, 459 U.S. 1117 (1983). A defendant may be a party to the conspiracy even though he

does not know all the other conspirators or the details of how the conspiracy is to be carried out. The requirement that defendant have knowledge of the conspiracy is satisfied by proof that defendant knew the essential object of the conspiracy. Christian, 786 F.2d at 211.

In this case, the indictment charged a conspiracy to possess with intent to distribute, and to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1).3 The indictment alleged that the conspiracy

> consisted of an agreement between and among the various co-conspirators allowing for each member thereof to perform certain specific functions designed when each conspirator performed his part to develop a market for and supply users and peddlers with illicit and illegally obtained cocaine ... It was a further object of the conspiracy to collect the ppoceeds from the distribution of cocaine...and

---

3The indictment charged that the conspiracy included both cocaine and marijuana. However, there was no proof that marijuana was involved and the district court instructed the jury to disregard any references in the indictment to marijuana.

> cause these proceeds to be transmitted from wholesale and retail sellers of cocaine ... to the ultimate suppliers.

Defendant argues that the evidence showed only mere presence at the crime scene, mere association with conspirators, or, at best, an attempted sale, none of which are sufficent to tie him to the larger Monger-Memphis International Realtors distribution conspiracy. See Christian, 786 F.2d at 211; United States v. Stanley, 765 F.2d 1224, 1243 (5th Cir. 1985). He points to Arnold's testimony at trial that defendant did not know Monger and that she had never talked to defendant about drugs before.

We thing that the evidence, while not overwhelming, was sufficient to show a conspiracy between defendant and Arnold to distribute cocaine. First, the transaction involved a commercial quantity of drugs. "A large volume of narcotics creates an inference of conspiracy." United States v. Bourjaily, 731 F.2d 539, 545

(6th Cir. 1986), aff'd, 483 U.S. ___, 107 S.Ct. 2775 (1987); cf. United States v. Dickey, 736 F.2d 571, 582 (10th Cir. 1984), cert. denied, 469 U.S. 1188 (1985) (where large quantities of drugs are involved, each major buyer may be presumed to know he is part of a wide-ranging venture). There was testimony at trial that cocaine for personal use is generally purchased by the gram, and the eight ounces of cocaine Arnold was bringing to defendant had a street value of about $16,000.

Arnold testified that defendant said someone else wanted eight ounces of cocaine, and he asked her if she had it. Triple-beam scales, commonly used to weigh narcotics, were found in the apartment where defendant was arrested. Police discovered plane tickets in the apartment and in a car from which the jury could conclude that defendant had traveled between Houston, Memphis, Chicago, Detroit, and Fort Wayne, Indiana in

April and May. These facts also support an inference of conspiracy. Cf. United States v. Pennell, 737 F.2d 521, 537 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985) (large amount of cocaine and possession of equipment used to divide drugs into smaller quantities supported conclusion of conspiracy to possess with intent to distribute cocaine).

The conclusion that defendant and Arnold conspired together is further buttressed by evidence that they knew each other prior to this transaction. Arnold first met defendant six or seven years ago when they both lived in Fort Wayne, Indiana. In June 1986, defendant was a resident of Houston, and defense witnesses testified that defendant came to memphis to search for his daughter. Arnold testified that defendant did not tell her where he was staying in Memphis, but she "kind of knew" where he was because she had been to that apartment before to

check on it for defendant.

Because a defendant need not know all the parties to the illegal agreement in order to be guilty of conspiracy, it was not necessary for the government to prove in this case that defendant actually knew Monger and was aware of the operation of Memphis International Realtors. However, the jury could have inferred from the telephone conversation between Arnold and Monger on June 3 that Monger also had an ongoing relationship with defendant. When Arnold called Monger to ask about the price for the eight ounces of cocaine, she identified her customer simply as "Joe." The government suggested that the jury could infer that Monger knew who defendant was and to whom Arnold referred, and therefore further identification was unnecessary. In addition, Arnold's question, "What kind of price can you give Joe?", implies that perhaps there was a special price for defendant.

Finally, Monger instructed Arnold that defendant should deal directly with him in the future.

When all these facts and circumstances are considered in the light most favorable to the government, we conclude that there was sufficient evidence from which the jury could find that defendant knew of the essential object of the conspiracy and knowingly agreed to participate in the distribution of cocaine. This case can be distinguished from United States v. Gaviria, 740 F.2d 174 (2d Cir. 1984), because in this case defendant affirmatively acted to further the conspiracy by requesting a delivery of cocaine, whereas the defendant in Gaviria was merely present at the transaction.

Defendant next contends that the district court erred in admitting into evidence the telephone conversations intercepted by police. Under Fed. R. Evid. 801(d)(2)(E), statements made by a coconspirator during the course and in

furtherance of the conspiracy are not hearsay, and may be admitted against any other coconspirator, even if the coconspirator was not present when the statements were made. This rule is based on the rationale that coconspirators, as partners in crime, are considered to be agents for one another, and acts and declarations made in furtherance of the common plan are admissible against each participant. Anderson v. United States, 417 U.S. 211, 218-19 n.6 (1974); 4 J. Weinstein & M. Berger, Weinstein's Evidence § 801(d)(2)(E)[01] at 801-232-33 (1987). Statements made by coconspirators after the illegal objective has been achieved and the conspiracy has terminated are not admissible against other coconspirators because the agency relationship has also terminated. The requirement that the declarant's statements must be in furtherance of the conspiracy before they are admissible against other conspirators is

analogous to the principle of agency law that the principal is only bound when an agent acts within the scope of his authority. The "in furtherance" element is designed to strike a balance between the government's need for proof of conspiracy, and the defendant's need for protection from the idle chatter, inadvertent misrepresentation, or deliberate falsifications of coconspirators. Id. at 801-235.

Before admitting conconspirators' hearsay statements, the district court must find, by a preponderance of the evidence, that the statements satisfy the requirements of Fed. R. Evid. 801(d)(2)(E); that is, that the declarant and defendant were members of a conspiracy, and the statements were made in the course of and in furtherance of the conspiracy. Bourjaily v. UnitedStates, 483 U.S. ___, 107 S.Ct. 2775, 2778-79 (1987). In making this preliminary factual determination, the district court may consider

the statements cought to be admitted. Id. at 2782. At the close of the government's case, the district court entered on the record its findings that the recorded telephone conversations were admissible under Fed. R. Evid. 801(d)(2)(E).

Defendant argues that the telephone conversations on June 3 should not have been admitted into evidence because there was insufficient evidence of defendant's participation in the conspiracy. We have already determined that there was sufficient evidence to convict defendant of conspiracy; therefore, these two conversations were properly admitted.

As his final assignment of error, defendant argues that the district court erred in admitting the two conversations on June 5 because the statements were not made in the course of and in furtherance of the conspiracy.

We disagree with defendant's contention that the conspiracy terminated on June 3, 1986, when

defendant, Arnold and Northington were arrested. "[W]here a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated; and its members continue to be conspirators until there has been an affirmative showing that they have withdrawn." Hamilton, 689 F.2d at 1268 (quoting United States v. Mayes, 512 F.2d 637, 642-43 (6th Cir.), cert. denied, 422 U.S. 1008 (1975)). Many courts have held that the fact of arrest does not protect the arrested conspirator from admission of statements made by unarrested coconspirators whil the conspiracy is still continuing. See 4 J. Weinstein, supra, 801(d)(2)(E)[01] at 801-249-50 nn. 63-64 and cases collected therein. The indictment charged that the conspiracy continued until about July 10, 1986, and particularly alleged specific overt acts concerning the distribution of cocaine which

were committed after June 3 by other coconspirators who had not yet been arrested. Defendant did not make any showing that the conspiracy had been abandoned or that he had withdrawn.

The more troublesome question is whether the conversations were in furtherance of the conspiracy. In the first conversation, defendant, Arnold and Monger agreed that Arnold had been set up, and that the police knew she was going to make a delivery of cocaine on June 3. Defendant stated that he did not know which "end" the leak to police came from, and because he was afraid that the phone was tapped he was not going to say anything over the phone. The jury could infer from the reference to "end" that defendant was a member of an organization in which each participant performed different functions designed to serve as links in the chain of distribution of cocaine and collection of the

proceeds, as alleged in the indictment. The district court correctly noted that whether or not this conversation was in furtherance of the conspiracy, defendant's statements were admissible against him under Fed. R. Evid. 804(b)(3) as statements against his interest because they tend to subject him to criminal liability.

The second conversation involved only Arnold and Monger. Arnold was interrupted by a phone call from defendant. Arnold placed Monger on hold while she took defendant's call; then she discussed what defendant had said with Monger. Arnold told Monger that defendant insisted the leak did not come from his "end," and particularly, not from a girl with whom defendant was associated. Arnold suspected that this girl had gone to the police because she did not like Arnold. Defendant asked Arnold to tell the police that she had lied when she told them the

cocaine was for Northington, so that Northington could be released from jail. Defendant also suggested that for $20,000 he could obtain a lawyer who would take care of everything.

The government argues, and the district court agreed, that this conversation was in furtherance of the conspiracy because it concerns how defendant and Arnold could avoid the charges against them, keep the organization together, and continue the distribution of cocaine. The Supreme Court has held that statements regarding concealment of the conspiracy, made after the criminal objective is completed, are not in furtherance of the conspiracy. see Krulewitch v. United States, 336 U.S. 440 (1949). But declarations regarding concealment, made to protect an ongoing conspiracy from detection and to permit the conspsirators to achieve their objective, are considered to be in futherance of the conspiracy. E.g., United States v. Howard,

770 F.2d 57, 60-61 (6th Cir. 1985); United States v. De Peri, 778 F.2d 963, 981-82 (3d Cir. 1985), cert. denied, 475 U.S. 1110 91986); Unitd States v. Griggs, 735 F.2d 1318, 1324-25 (11th Cir. 1984).

The second conversation on June 5 between Monger and Arnold concerned defendant's efforts to find out who the informant was, to get Northington out of jail, and to avoid the charges. The statements were intended to further the conspiratorial objectives by plugging any leaks, preventing further arrests, and returning arrested conspirators back to the organization. "In any case, we recognize that where the admissibility of the coconspirators' statements presents a close call we should not disturb the district court's finding." Hamilton, 689 F.2d at 1270-71.

Accordingly, finding no error in the trial, we affirm defendant's conviction.

NO. 87-5993; UNITED STATES V. JOE LCEY

WELLFORD, Circuit Judge, concurring:

This is a troubling case, not because I entertain any reasonable doubt about the defendant's involvement in a substantial drug transaction, but rather because of the conspiracy charge and the admission of the June 5, 1986 telephone call into evidence. Judge Norris has satisfactorily set out the facts and the circumstances of the case. It is less certain, however, that, without proof of the June 5 call, there was sufficient evidence to convict the defendant of the drug conspiracy charge. Judge Norris characterizes the evidence, which includes the contested call, as "not overwhelming," and I agree with this assessment.

The evidence establishes that Lacey knew, and had past associations with, co-defendants Arnold

who clearly was a member of the Monger drug conspiracy operation in Memphis. There is little evidence that Lacey knew Freeman Monger or theother codefendants involved with Monger, except Arnold, before the June 3 arrest of Arnold and Lacey. It is also clear that Lacey contacted Arnold to obtain a substantial quantity of cocaine which could reasonably be assumed to be for further distribution.

It is also evident that Monger's drug operations continued and extended before June 3 or June 5 and after the time that Arnold and Lacey were arrested and released from custody. There was, however, no substantive offense charge made against Lacey or against Otha Northington, who apparently shared the apartment which was the scene of the June 3, of her relationship with Monger and was aware only of her agreement to deliver him the cocaine he sought. There is no

evidence that Lacey had further dealings with the conspirators except for a telephone call or calls after his arrest and release in which Lacey claimed he did not "set up" Arnold and was trying to hire a lawyer "for everything to get taken care of."

I harbor doubts about the admissibility of the June 5 calls as a part of the continuing conspiracy as it relates to Lacey. At the same time, if it were error to admit the call or calls, after careful consideration of their content, I am satisfied that such error, if any, was harmless. Lacey does not relate in the conversation any information that connects him to Monger or other alleged conspirators, except Arnold; he maintains that he was not the one who tipped off the police to the cocaine delivery and that he was trying to get a lawyer to defend himself (and also Arnold and Northington) after

his arrest.

There is ample evidence that Lacey conspired at least with Arnold, if with no one else, to possess cocaine with the intent to distribute it. There is also ample evidence that Arnold was then part of the Monger group which was distributing drugs and that her role was to deliver the drugs as she did in this case. It seems immaterial whether or not Lacey was acting as an agent for Northington.

In sum, having expressed some reservations about those elements of the case that are troubling, I am satisfied that there was no reversible error in the verdict of the jury and in the judgment of conviction entered by the district court.

United States v. Lacey, No. 87-5993

COOK, District Judge, concurring:*1

I write to express my belief that while the two June 5, 1986 telephone calls involving Lacey were admissible to prove his involvement in a "continuing conspiracy" with Arnold and Monger, they were the items of evidence without which Lacey's conviction would have been unreasonable.

In my view the June 5 calls constitute the requisite "independent evidence" of conspiracy which is needed to make a single act (here, the attempted Arnold-Lacey transaction of June 3) sufficient to establish a conspiracy. United States v. Pantoja-Soto, 739 F.2d 1520 (11th Cir. 1984); United States v. Watson, 594 F.2d 1330, 1337 (10th Cir. 1979).

It is no bar to the admissibility of the

1The Honorable Julian Abele Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

telephone calls that one of them did not involve Lacey or that neither call mentioned his name except to refer to him as "Joe". Circumstantial evidence is often the only available evidence of a conspiracy, except for conspiracies among the "veriest bungiers," United States v. Valenti, 134 F.2d 362, 364 (2d Cir. 1943). It is well-settled that such evidence may be used to prove a conspiracy. United States v. Thompson, 533 F.2d 1006 (6th Cir.), cert. denied, 429 U.S. 939 (1976).

However, I do not agree with the suggestion that to consider the telephone calls, if error, was harmless. Without those conversations, Lacey's conviction could have been based only upon an inference that (1) he knew of the scheme because he conspired with Arnold to possess contraband on June 3, and (2) Arnold was involved in the scheme. Such reasoning is perilously close to the "piling [of] inference upon inference" which the courts have prohibited in conspiracy cases. United States v. Sheikh, 654 F.2d 1057, 1063 (5th Cir. 1981). Moreover,

Lacey's mere presence at the scene of the arrests, even when followed by flight, is insufficient to warrant an inference of guilt. United States v. Pantoja-Soto, 739 F.2d 1520, 1526 (11th Cir. 1984).

With this reservation, I concur in the opinion of the Court.

ISSUED AS MANDATE: October 11, 1988
COSTS TAXED: None

Attest:
LEONARD GREEN, Clerk

By_____
Deputy Clerk

Respectfully Submitted

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